

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Tri-Borough NY Medical Practice PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-24-1338-9566

Applicant's File No. N/A

Insurer's Claim File No. 8772414100000001

NAIC No. 35882

ARBITRATION AWARD

I, Kihyun Kim, the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: the Assignor

1. Hearing(s) held on 08/22/2024
Declared closed by the arbitrator on 08/22/2024

Usman Nawaz, Esq. from Law Offices of Hillary Blumenthal LLC (Hoboken)
participated virtually for the Applicant

Tal Sloan, Esq. from Geico Insurance Company participated virtually for the
Respondent

2. The amount claimed in the Arbitration Request, **\$838.61**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount in dispute was amended to \$727.53 to reduce Applicant's charges to an amount asserted to be consistent with the fee schedule.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The issue presented is whether the post-IME cutoff services were medically necessary.

The Assignor (AJ) was a 37-year-old female who was a passenger in an automobile that was involved in an accident on April 24, 2023. Applicant seeks reimbursement in the aggregate amount of \$727.53 for two office evaluations of the Assignor and the assistant

services related to the arthroscopy of the right knee of the Assignor conducted, subsequent to the IME cutoff, from December 5, 2023 to January 12, 2024. The orthopedic IME cutoff became effective on September 28, 2023 based on the orthopedic examination by Howard A. Kiernan, M.D., conducted on September 12, 2023.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the close of the hearing and such documents are hereby incorporated into the record of this hearing. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

The Assignor was a 37-year-old female who was injured in an automobile accident on April 24, 2023. Following the accident, the Assignor did not seek any emergency treatment but two days later, the Assignor went to urgent care, where she was examined, treated and released the same day. The Assignor subsequently sought treatment, testing and supplies for his injuries from various providers, who started her on a course of conservative treatment including physical therapy and chiropractic care.

On September 12, 2023, the Assignor appeared for an orthopedic examination with Howard Kiernan, M.D., at the request of Respondent. Dr. Kiernan determined, based on the findings on examination, review of the medical records and the history provided by the Assignor, that no further orthopedic treatment was medically necessary and that an end result had been reached in his specialty, Orthopedic Surgery. On September 20, 2023, Respondent issued a general denial based upon the IME by Dr. Kiernan that stated, among other things, that all orthopedic surgery, massage therapy, diagnostic testing, supplies, and physical therapy benefits would be denied effective 12:01 a.m. on September 28, 2023.

Subsequent to the general denial, from December 5, 2023 to January 12, 2024, the Assignor presented to Applicant for two office evaluations and underwent an arthroscopy of the right knee performed by Robert Drastic, D.O., and assisted by Shmuel Kaufman, P.A., at a facility in Oradell, New Jersey. Applicant billed Respondent for the office visits and the assistant services related to the surgery, and Respondent timely denied Applicant's claims as medically unnecessary based on the September 12, 2023 IME by Dr. Kiernan.

Applicant now seeks reimbursement in the aggregate amount of \$727.53 for the two office evaluations of the Assignor and the assistant services related to the arthroscopy of the right knee of the Assignor conducted, subsequent to the IME cutoff, from December 5, 2023 to January 12, 2024.

Legal Framework - Medical Necessity - IME

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate*

Ins. Co., 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). An insurance carrier may utilize an independent medical examination (IME) to determine whether an eligible injured person is entitled to further care and treatment or other first-party benefits. *See Rowe v. Wahnnow*, 26 Misc.3d 8, 11-12 (App Term, 1st Dept 2009, McKeon, P.J., dissenting). "An IME is a snapshot of the injured party's medical condition as of the date" it is conducted. *Amato v. State Farm Ins. Co.*, 2010 NY Slip Op. 20431 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Oct. 13, 2010).

An IME report can be the basis of a termination of benefits if ultimately found to be persuasive. An IME report must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. *Ying Eastern Acupuncture, P.C. v. Global Liberty Ins.*, 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). The determination that an eligible injured person no longer needs treatment is generally based upon an examiner's findings that result in the conclusion that: (1) the patient has fully recovered from the injuries; (2) the patient has made as full a recovery as is possible taking into account the nature and extent of the injuries, the patient's age, pre-existing conditions or other factors; and/or (3) additional treatment or testing will not provide any medical benefit to the patient. *Amato v. State Farm Ins. Co.*, 2010 NY Slip Op. 20431 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Oct. 13, 2010). Whether an IME report is persuasive and meets the carrier's burden is a factual decision, which must be rendered on a case by case basis.

If the IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, the burden shifts back to the Applicant to refute the IME findings and prove the necessity of the disputed services. *See, CPT Med. Servs., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 18 Misc.3d 87 (App. Term 1st Dept.); *Eden Med., P.C. v. Progressive Cas. Ins. Co.*, 19 Misc.3d 143(A) (App Term 2d & 11th Jud. Dists., 2008); *Be Well Med. Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 18 Misc.3d 139 (A) (App. Term 2d Dept., Feb. 21, 2008); *A. Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co.*, 16 Misc. 3d. 131 (A) (App Term 2d Dept.); *West Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d. 131 (A) (App Term 2d Dept., 2006). If the Applicant fails to present any evidence to refute Respondent's showing, the claim should be denied, as the ultimate burden of proof on the issue of medical necessity lies with the Applicant. *See Insurance Law § 5102; Wagner v. Baird*, 208 A.D.2d 1087 (3d Dept. 1994); *AJS Chiropractic, P.C. v. Mercury Ins. Co.*, 22 Misc.3d 133(A), (App. Term 2d & 11th Dist. Feb. 9, 2002). The case law is clear that a provider must rebut the conclusions and determinations of the IME doctor with his own facts. As the Appellate Term, 2d, 11th & 13th Dists., recently stated: "it is ultimately plaintiff who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary." *Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co.*, 37 Misc.3d 19, 22 (App. Term 2d, 11th & 13th Dists. 2012).

IME - Howard A. Kiernan, M.D., dated September 12, 2023

Respondent relies principally upon the IME report of Howard Kiernan, M.D., dated September 12, 2023 in asserting lack of medical necessity for the two office evaluations of the Assignor and the assistant services related to the arthroscopy of the right knee of the Assignor conducted, subsequent to the IME cutoff, from December 5, 2023 to January 12, 2024. At the September 12, 2023 examination, Dr. Kiernan obtained the Assignor's history, reviewed medical records, and conducted a physical examination of the Assignor. Ranges of motion were performed by the examiner using a hand-held goniometer.

At the time of the examination, the Assignor complained of pain in the neck, low back and right knee. She reported that her symptoms have remained the same since the reported date of injury. The Assignor walked into the exam room with a normal gait and posture. No limp or foot drop was present, and no brace or assistive device was used.

The examination of the cervical spine revealed no swelling, discoloration or deformity; no muscle spasm upon palpation of the paracervical muscles; and no complaint of tenderness upon palpation. Ranges of motion were within normal limits (flexion: 50°/50°; extension: 60°/60°; left and right lateral flexion: 45°/45°; left and right rotation: 80°/80°). Spurling's test, Lhermitte's sign, Hoffman's test, and Compression tests were all negative.

Neurological examination of the bilateral upper extremities revealed no atrophy; muscle strength at 5/5; deep tendon reflexes at 2+; and sensation to light touch and pinprick within normal limits.

Examination of the thoracic spine revealed no swelling, discoloration or deformity; no parathoracic spasm; and no complaint of tenderness upon palpation. Active ranges of motion were within normal limits (flexion: 45°/45°; extension: 0°/0°; left and right lateral flexion: 45°/45°; left and right rotation: 25°/25°).

The examination of the lumbar spine revealed no swelling, discoloration or deformity; no muscle spasm upon palpation of the paralumbar muscles; and no complaint of tenderness upon palpation. Active ranges of motion were within normal limits (flexion: 60°/60°; extension: 25°/25°; left and right lateral flexion: 25°/25°). Straight leg raise was negative with no radiculopathy. Fabere, Babinski sign, Long Tract Sign, and Lasegue's test were all negative.

Neurological examination of the bilateral lower extremities revealed no atrophy; muscle strength at 5/5; deep tendon reflexes at 2+; and sensation to light touch within normal limits.

The examination of the right and left shoulders revealed no heat, swelling, effusion, erythema, or crepitus. Hawkins/Kennedy Impingement, Neer Impingement maneuver, Cross Arm Adduction, Empty can (Jobe's) test, Scapular Winging, Drop Arm, O'Brien, Painful Arc, and atrophy of deltoid were all negative. Rotator cuff strength was 5/5. There was no complaint of tenderness upon palpation in the acromioclavicular or supraspinatus. Active ranges of motion within normal limits (forward flexion: 180°/180°; extension: 60°/60°; abduction: 180°/180°, adduction: 30°/30°, internal rotation: 70°/70°; external rotation: 90°/90°).

The examination of the bilateral elbows revealed no heat, swelling, effusion, erythema, or crepitus appreciated. There was no complaint of tenderness upon palpation in the olecranon or epicondyle. Tinel's and Apley's tests were negative. Biceps and triceps strength were 5/5. Active ranges of motion were within normal limits (flexion: 150°/150°; extension: 0°/0°; supination to 90°/90°; pronation to 90°/90°. No varus or valgus instability was noted.

The examination of the bilateral wrists revealed no heat, swelling, effusion, erythema, or crepitus appreciated. Sensation Testing was normal. Tinel's, Phalen's, Finkelstein, Watson, and Ballottement tests were all negative. There was no atrophy of the thenar muscles. Grip strength, pinch strength, and intrinsic muscle strength were all 5/5. Active ranges of motion were within normal limits (palmar flexion: 60°/60°; dorsiflexion (extension): 70°/70°; pronation: 90°/90°; supination: 90°/90°; radial-deviation: 20°/20°; and ulnar deviation: 30°/30°). Extension and flexion strength testing revealed 5/5 strength. There was no complaint of tenderness upon palpation.

The examination of the bilateral hands revealed no triggering of fingers. Ranges of motion of the digits of the hand were within normal limits.

The examination of the right and left hips revealed no heat, swelling, or redness appreciated, and no complaint of tenderness upon palpation. Trendelenburg sign and Feber were negative. Flexion strength, abduction strength, and adduction strength were 5/5. Active ranges of motion were within normal limits (forward flexion: 120°/120°; extension: 30°/30°; abduction: 45°/45°, adduction: 35°/35°; external rotation: 45°/45°; internal rotation: 45°/45°).

The examination of the bilateral knees revealed no heat, swelling, effusion, erythema, or crepitus appreciated, and no complaint of tenderness on palpation. Lachman's, Patella Tracking, Anterior Drawer, Posterior Drawer, Patella Grind, Patella Bursitis, McMurray's, Bounce, and Pivot Shift were all negative. The knees were stable on Varus/Valgus stress, and no Varus/Valgus deformity noted. Active ranges of motion were within normal limits (flexion: 140°/140°; extension: 0°/0°). Quadriceps and hamstring strength testing revealed 5/5 strength, and no atrophy. No chondromalacia was present on palpation of the patella.

The examination of the bilateral ankles revealed no heat, swelling, effusion, erythema, or crepitus; and no evidence of atrophy. Drawer and Talar tilt were negative. There was no instability noted. Dorsiflexion and plantar flexion strength were 5/5. Active ranges of motion were within normal limits (dorsiflexion (extension): 20°/20°; plantar flexion (flexion): 40°/40°; inversion: 30°/30°; eversion: 20°/20°). There was no complaint of tenderness upon palpation.

The examination of the bilateral feet revealed ranges of motion were within normal limits.

The diagnoses were cervical spine sprain/strain - resolved; thoracic spine sprain/strain - resolved; lumbar spine sprain/strain - resolved; bilateral shoulder sprain/strain - resolved; right wrist/hand sprain/strain - resolved; and right knee sprain/strain - resolved.

Dr. Kiernan found no evidence of a disability. He opined based on his findings on examination, review of medical records and the history provided by the Assignor, that no further orthopedic treatment was medically necessary and that an end result had been reached in his specialty, Orthopedic Surgery. He further stated that based his examination of the cervical spine, thoracic spine, lumbar spine, bilateral shoulder, right wrist/hand and right knee, there were no objective findings of muscle spasm, heat, swelling, effusion, erythema, or crepitus or any positive orthopedic testing to substantiate the Assignor's subjective complaints of pain. He also found there were no complaints of tenderness; all ranges of motion were within normal limits; and neurological examination was objectively normal. He maintained that there was no need for further orthopedic treatment.

Dr. Kiernan specifically opined that there was no need for any further orthopedic treatment including physical therapy, massage therapy, injections, surgery, durable medical equipment, diagnostic testing, prescription medication, special transportation, or household help.

Dr. Kiernan also stated that he reviewed the medical records, including diagnostic testing and MRI reports pertaining to the diagnosed sites, and that the findings were duly noted. However, he found there was no objective clinical findings on examination to correlate with the need for any further orthopedic treatment to these areas.

I find the IME report sufficient to meet Respondent's burden of production. The burden now shifts to the Applicant as it is the Applicant's burden, ultimately, to establish the medical necessity of the DME at issue. *See* Insurance Law § 5102; *Shtarkman v. Allstate Insurance Co.*, 2002 NY Slip Op 50568(U), 2002 WL 32001277 (App. Term 9th & 10th Jud. Dists. 2002) (burden of establishing whether a medical test performed by a medical provider was medically necessary is on the latter, not the insurance company).

Analysis - Medical Necessity - Office/Assistant - DOS 6/26/23

Applicant did not submit a formal rebuttal to address the September 12, 2023 IME report by Dr. Kiernan. In opposition, Applicant relies upon the Assignor's medical records. At the hearing, Applicant's counsel pointed to the June 29, 2023 examination report as the most contemporaneous examination report in the record. Counsel also pointed to the May 17, 2023, MRI of the right knee which revealed, among other things, a partial ACL tear in the right knee. Counsel asserted that the Assignor's complaints at the IME, along with the complaints and positive findings in the contemporaneous examination reports and other reports in the record demonstrated that the Assignor's injuries were not resolved at the time of the IME, and that the continued treatment was medically necessary and justified.

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Applicant failed to establish, by a preponderance of credible evidence, that the two office evaluations of the Assignor and the assistant services related to the arthroscopy of the right knee of the Assignor conducted, subsequent to the IME cutoff, from December 5, 2023 to January 12, 2024, were medically necessary. The IME was conducted on September 12, 2023, approximately four and a half months after the

accident, and the IME report documented what appeared to be a detailed and thorough examination with no positive findings noted. The services at issue were conducted approximately three to four months after the IME from December 5, 2023 to January 12, 2024. I find that the June 29, 2023 examination report (two and a half months prior to the IME) identified by Applicant's counsel at the hearing to be too far removed from the IME report by Dr. Kiernan to be probative on the issue of medical necessity herein. In fact, there were no examination reports in the record that were sufficiently contemporaneous with the IME report. Counsel at the hearing did note that the May 17, 2023 MRI of the right knee revealed various positive findings, including a partial ACL tear. While the MRI findings (specifically the asserted tear) may arguably provide some evidence of continuing injury at the time of the IME, the lack of any other objective contemporaneous evidence of continuing injury around the time of the IME makes it difficult to simply accept that such MRI findings (specifically the asserted tear) were accurate and reliable and were sufficient to rebut the IME report. In fact, no ACL tear was documented in the operative report, and again, the IME documented a detailed and thorough examination of the right knee with no positive objective findings noted. It has been held that: "An IME is a snapshot of the injured party's medical condition as of the date of the IME. The opinion of the doctor conducting an IME and issuing a report that no further treatment or testing is needed is nothing more than an expert's opinion that at the time the examination was conducted the claimant did not need any further treatment or testing." *Amato v. State Farm Ins. Co.*, *supra*. Also, "a person's condition can wax and wane after a motor vehicle accident" *See Huntington Medical Plaza, P.C. v. Travelers Indemnity Co.*, 43 Misc.3d 129(A), 990 N.Y.S.2d 437 (Table), 2014 N.Y. Slip Op. 50527(U), 2014 WL 1344448 (App. Term 2d, 11th & 13th Dists. Mar. 21, 2014), *aff'g*, 34 Misc.3d 874, 937 N.Y.S.2d 830 (Civ. Ct. Queens Co. 2011). Despite this, the law nevertheless permits an insurance carrier to utilize an independent medical examination to determine whether an eligible injured person is entitled to further care and treatment. I have also reviewed all of the other medical reports in the record, but did not find any contemporaneous records or any other records, including progress notes, that sufficiently explained how or why the continued services over seven and a half months after the accident were medically necessary. In sum, there is simply insufficient objective evidence in the record to persuasively rebut the findings, diagnoses and recommendations of no further treatment contained in the IME report. Ultimately, I find the IME report to be more persuasive and credible than the rebuttal and Applicant's supporting medical documentation and oral arguments. Based on the totality of the evidence in the record, Applicant has failed to rebut Respondent's defense and establish the medical necessity for the services at issue. As Applicant failed to meet its burden of persuasion, Applicant's claims for reimbursement for the two office evaluations of the Assignor and the assistant services related to the arthroscopy of the right knee of the Assignor conducted, subsequent to the IME cutoff, from December 5, 2023 to January 12, 2024, are denied.

Conclusion

For the reasons set forth herein, Applicant's claims are denied in their entirety. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. **I find as follows with regard to the policy issues before me:**

- ☐ The policy was not in force on the date of the accident
- ☐ The applicant was excluded under policy conditions or exclusions
- ☐ The applicant violated policy conditions, resulting in exclusion from coverage
- ☐ The applicant was not an "eligible injured person"
- ☐ The conditions for MVAIC eligibility were not met
- ☐ The injured person was not a "qualified person" (under the MVAIC)
- ☐ The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
- ☐ The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY

SS :

County of Suffolk

I, Kihyun Kim, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

09/20/2024
(Dated)

Kihyun Kim

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

ELECTRONIC SIGNATURE

Document Name: Final Award Form
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Electronically Signed

Your name: Kihyun Kim
Signed on: 09/20/2024